

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON DIVISION**

JOSHUA M. SETTLE,

Plaintiff,

v.

**Civil Action No. 2:18-cv-01177
Judge John T. Copenhaver, Jr.**

**NATHAN SCOTT STEPP,
Individually as a member of the
West Virginia State Police,**

Defendant.

**DEFENDANT'S REPLY TO PLAINTIFF'S RESPONSE IN OPPOSITION TO
DEFENDANT'S MOTION FOR PROTECTIVE ORDER**

COMES NOW, the Defendant, Nathan Scott Stepp, individually, by counsel, Wendy E Greve, W. Austin Smith, and Pullin, Fowler, Flanagan, Brown & Poe, PLLC, and files his reply to Plaintiff's Response in opposition to Defendant's Motion for Protective Order, and states as follows:

Plaintiff's Section 1983 action alleges that Trooper Stepp, while acting under color of law, violated Plaintiff's constitutional rights by using excessive force and unlawful force" and that "Trooper Stepp's brutal acts were unlawful, unreasonable, and unjustified, as Plaintiff was unarmed, not resisting arrest, and posed no immediate threat to the safety of Trooper Stepp." (ECF no. 1 ¶¶ 61,64). Plaintiff makes no claims against the West Virginia State Police on Monell liability or for negligent hiring, training, and/or supervision under West Virginia common law. Accordingly, Defendant fails to see how Plaintiff feels that such a sweeping request to the Professional Standards Section is reasonably calculated to lead to the discovery of admissible evidence with respect to the case at bar.

It is important to note that Plaintiff misrepresents to this court Defendant's response to his Second Set of Requests for Production of Documents. While Defendant raised objections to the requests for information from the West Virginia Professional Standards Commission and/or the Professional Review Section, Defendant provided the PSU Investigation form from the subject incident. (See Defendant's Response No. 29 to Plaintiff's Second Set of Requests for Production of Documents). Accordingly, Plaintiff is in possession of these documents sought in his subpoena as they relate to this incident.

Plaintiff's reliance on Buskirk v. Wiles is misplaced. In Buskirk, the pro se plaintiff filed his Section 1983 claims against the individual officers in their "personal and professional capacities" in connection with alleged excessive force. (See Complaint, Motion to Amend, and Amended Complaint Case No. 3:15-cv-03503 attached hereto as **Exhibit 1**). This point, while nuanced, is not merely academic but rather critical to the analysis here. Official capacity suits are tantamount to suits against the office which the defendant official represent—not the official personally. See Kentucky v. Graham, 473 U.S. 159, 166, 105 S. Ct. 3099, 3105, 87 L. Ed. 2d 114 (1985) ("As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity.") See also Will v. Michigan Dep't of State Police, 491 U.S. 58, 71, 109 S. Ct. 2304, 2312, 105 L. Ed. 2d 45 (1989) ("[A]suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office"); Kowalyk v. Hancock Cty., 2009 WL 981848, at *2 (N.D. W. Va. Apr. 9, 2009); Ball v. Baker, 2012 WL 4119127,

at *10 (S.D. W. Va. Sept. 18, 2012). Accordingly, by operation of law, the Huntington Police Department was a party to the action, not just the individual officers.¹

In fact, in virtually every case cited by Plaintiff in support of his proposition that internal investigation files are relevant to Section 1983 excessive force claims, they almost all bring claims against the office itself under a Monell claim or a negligent hiring/supervision/training cause of action. See Cox v. McClellan, (alleging prison's superintendent "failed to adequately supervise their officers allowing the alleged violation to occur."); Garcia v. City of Imperial the City, 270 F.R.D. 566, 576 (S.D. Cal. 2010) objections sustained in part and overruled in part, No. 08CV2357 BTM PCL, 2010 WL 3719081 (S.D. Cal. Sept. 17, 2010) (alleging, inter alia, "the City, through the Department, has unlawful customs and practices of improper and inadequate hiring, training, retention, discipline and/or supervision of its police officers, proximately causing the constitutional deprivations, injuries and damages alleged in this Complaint."); Dawson v. Ocean Township, 2011 WL 890692, at *2 (D.N.J. Mar. 14, 2011) (alleging, inter alia, "supervisory liability" and "unlawful policy, custom, practice/inadequate training"); Reid v. Cumberland County, 34 F. Supp. 3d 396, 400 (D.N.J. 2013) (alleging Section 1983 claims against the Warden, Cumberland County Department of Corrections, and Cumberland County, among others); Morales v. Town of Glastonbury, 2011 U.S. Dist. Lexis 88408 (D. Conn. Aug. 10, 2011) (alleging Section 1983 claim for, inter alia, "failure to screen, supervise and/or train the officers against the Towns of Glastonbury, Manchester and South Windsor and their respective police chiefs."); Lamon v. Adams, 2010 WL 4513405, at *1

¹ Furthermore, the court limited the information to any performance reviews, citations/commendations, reprimands, or disciplinary actions for any improper use of force contained in the individual officers to the information contained in the officers' personnel files. Buskirk, 2016 WL 7118288, at *9-10 (S.D.W. Va. Dec. 6, 2016) (emphasis added).

(E.D. Cal. Nov. 2, 2010)(alleging Section 1983 claim against “supervisory Defendants . . . [who] violated Plaintiff’s Eighth Amendment rights by failing to adequately respond to Plaintiff’s administrative complaints, thereby exposing Plaintiff to a risk of further harm.”).

The only case cited by Plaintiff where discovery of the internal investigation files of public officials in claims made solely against individual officers was Laws v. Cleaver, No. 3:96 CV 92 (JGM), 1999 WL 33117449, at *4 (D. Conn. Nov. 17, 1999). In Laws, the district court acknowledged the split in authority with respect to the discovery of internal affairs documents when the claims are solely against public officials in their individual capacities and held that they were discoverable with very little analysis as to why and for what purpose. Id.

Additionally, Plaintiff’s reliance on Charleston Gazette v. Smithers is inapposite. First, it is important to note that the West Virginia Supreme Court in Smithers remanded the matter for further review by the circuit court to determine the documents subject to FOIA. 232 W. Va. 449, 473, 752 S.E.2d 603, 627. Furthermore, the issue here is not whether the documents sought fall under FOIA, but rather whether they are reasonably calculated to lead to the discovery of admissible evidence. To that end, it clearly does not meet the test.

As stated above, Plaintiff only raised claims against Trooper Stepp for excessive force. In an attempt to comply with Plaintiff’s requests to the extent it was not objectionable, Defendant provided the internal investigation information with respect to the instant matter. There is simply no basis for Plaintiff to obtain the entirety of the information he requests from the West Virginia State Police.² This request is clearly an

² Defendant makes no representation as to the existence vel non of such documents requested by Plaintiff’s subpoena.

attempt by Plaintiff to engage in a fishing expedition calculated to harass and annoy Defendant.

WHEREFORE, Defendant respectfully requests that this Court enter the proposed protective order.

NATHAN SCOTT STEPP
By Counsel,

/s/ Wendy E. Greve

Wendy E. Greve, Esq., WVS #11045
W. Austin Smith, Esq. WVS #13145

Pullin, Fowler, Flanagan, Brown & Poe, PLLC
JamesMark Building
901 Quarrier Street
Charleston, West Virginia 25301
Telephone (304) 344-0100
Facsimile (304) 342-1545

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON DIVISION**

JOSHUA M. SETTLE,

Plaintiff,

v.

**Civil Action No. 2:18-cv-01177
Judge John T. Copenhaver, Jr.**

**NATHAN SCOTT STEPP,
Individually as a member of the
West Virginia State Police,**

Defendant.

CERTIFICATE OF SERVICE

The undersigned counsel for defendant, Nathan Scott Stepp, individually and as a member of the West Virginia State Police, does hereby certify that on this **9th** day of **April 2019**, I electronically filed ***Defendant's Reply to Plaintiff's Response in Opposition to Defendant's Motion for Protective Order*** with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Eric J. Buckner, Esq.
Russell A. Williams, Esq.
KATZ, KANTOR, STONESTREET & BUCKNER, PLLC
112 Capitol St., Suite 100
Charleston, WV 25301
Telephone (304) 431-4053

/s/ Wendy E. Greve

Wendy E. Greve, Esq., WVS #11045
W. Austin Smith, Esq. WVS #13145

Pullin, Fowler, Flanagan, Brown & Poe, PLLC
JamesMark Building
901 Quarrier Street
Charleston, West Virginia 25301
Telephone (304) 344-0100
Facsimile (304) 342-1545

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA

Kenneth Ray Bushkirk

0001137364

(Enter above the full name of the plaintiff or plaintiffs in this action).

(Inmate Reg. # of each Plaintiff)

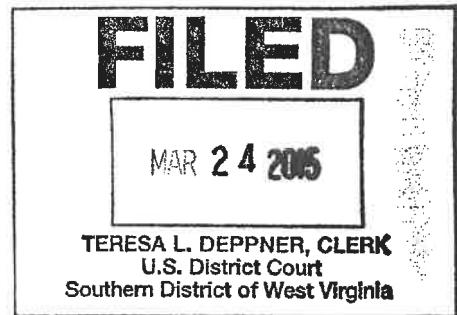
VERSUS

CIVIL ACTION NO.

(Number to be assigned by Court)

Huntington Police Department
Officer Wiles

(Enter above the full name of the defendant or defendants in this action)



COMPLAINT

I. Previous Lawsuits

A. Have you begun other lawsuits in state or federal court dealing with the same facts involved in this action or otherwise relating to your imprisonment?

Yes _____ No ✓

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B. If your answer to A is yes, describe each lawsuit in the space below. (If there is more than one lawsuit, describe the additional lawsuits on another piece of paper, using the same outline).

1. Parties to this previous lawsuit:

Plaintiffs:

~~N/A~~

Defendants:

~~N/A~~

2. Court (if federal court, name the district; if state court, name the county):

~~N/A~~

3. Docket Number:

~~N/A~~

4. Name of judge to whom case was assigned:

~~N/A~~

5. Disposition (for example: Was the case dismissed? Was it appealed? Is it still pending?)

~~N/A~~

6. Approximate date of filing lawsuit:

~~N/A~~

7. Approximate date of disposition:

~~N/A~~

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II. Place of Present Confinement: Western Regional Jail

A. Is there a prisoner grievance procedure in this institution?

Yes ✓ No _____

B. Did you present the facts relating to your complaint in the state prisoner grievance procedure?

Yes _____ No ✓

C. If you answer is YES:

1. What steps did you take? _____

2. What was the result? _____

D. If your answer is NO, explain why not: Cause it has

nothing to do with the jail.

III. Parties

(In item A below, place your name and inmate registration number in the first blank and place your present address in the second blank. Do the same for additional plaintiffs, if any.)

A. Name of Plaintiff: Kenneth Buskirk 0001137364

Address: W.R.T One Mountain Pl. Barboursville WV 25504

B. Additional Plaintiff(s) and Address(es): _____

(In item C below, place the full name of the defendant in the first blank, his/her official position in the second blank, and his/her place of employment in the third blank. Use item D for the names, positions, and places of employment of any additional defendants.)

C. Defendant: Officer Wiles

is employed as: A Huntington Police Officer
at Huntington Police Dept. 675 10th St.

D. Additional defendants: They were 2 other police
officers but I'm not sure of their names.

IV. Statement of Claim

State here as briefly as possible the facts of your case. Describe how each defendant is involved. Include also the names of other persons involved, dates and places. Do not give any legal arguments or cite any cases or statutes. If you intend to allege a number of related claims, set forth each claim in a separate paragraph. (Use as much space as you need. Attach extra sheets if necessary.)

On Dec 14th 2014 I came out Madison Manor on 14th West Street. Off Wiles told me to come to him, I did. He did not give any order like "you under arrest, turn around etc" he took his night stick and swing at my head I threw my left arm up to block the blow then I took off running to my car about a block away. Wiles followed during the chase he shot me twice with his stun gun for some reason they didn't break my skin which had no effect on me.

IV. Statement of Claim (continued):

I made it inside the car Officer Wiles started hitting the ~~passenger~~ ^{Driver side} window with his stick like he was crazy or somethin I finally got the car started & in that instant he busted the window ^{out} as I pulled off. I made it to Sheets gas station in the West End of Huntington, got out of the car took off running again on foot cause I was really scared Anyways I ran about 30ft Officer Wiles then hit me with his vehicle in the left leg

"continuation sheet of paper"

V. Relief

State briefly exactly what you want the court to do for you. Make no legal arguments.
Cite no cases or statutes.

I want compensation and I would like for the persons involved to be punished in some way sharp or form, & or I'm open for suggestions.

IV.

(Continued)

3.

Causing me to fall face first onto the ground. The Cop hit me so hard with his vehicle it knocked my left shoe off. As I lay on the ground the officer jumped on my back started punching me in my ribs & kidney's "I am not resisting" other officers arrived and they started hitting me I couldn't breath & after that I don't remember much where they knocked me out. I got my senses back kinda when they picked me up & put me against the Cop Car.

I was pouring the blood from my head. The police took me to the parking lot of the Police Dept. then called an Ambulance.

I started puking in the parking lot "from being hit" while waiting one the ambulance.

The Ambulance took me to Cabell Hunt Hospital, were they treated me for a left broke arm 10 staples in the back of my head, bruised & or busted ribs and my right kidney also lacerations to my face.

I sustained all of these injuries due to the Huntington Police Dept beating me senseless.

Then I went to jail were they put me in Medical for bout 2 weeks due to my injuries.

The Doctor here at the jail whom worked for Cabell Hunt Hospital for 30 yrs said that my broke arm was a night stick fracture. Cause of the way it was broke.

V

Mis or Sir

I'm not Sure which officer did what except for Off Wiles breaking my Arm & hitting me with his Vehicle Also punching me in my rib & kidney due to where I was unconscious.

This Incident was handled Very Unprofessional & Violently

Also they didn't read me my Miranda rights

Thank you

Kenny Bystirk
Kenny Bystirk

V. Relief (continued)):

VII. Counsel

A. If someone other than a lawyer is assisting you in preparing this case, state the person's name:

N/A

B. Have you made any effort to contact a private lawyer to determine if he or she would represent you in this civil action?

Yes ✓ No _____

If so, state the name(s) and address(es) of each lawyer contacted:

I contacted straight And I Since I'm looked up they said they
couldn't help. My Mom contacted Courtney Crissey and he said

If not, state your reasons: he couldn't do anything till
he was appointed?

C. Have you previously had a lawyer representing you in a civil action in this court?

Yes _____ No ✓

If so, state the lawyer's name and address:

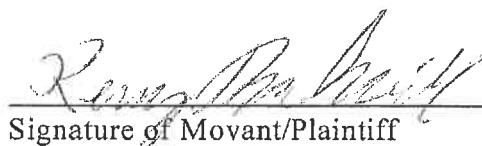
Signed this 19 day of March, 2015.



Signature of Plaintiff or Plaintiffs

I declare under penalty of perjury that the foregoing is true and correct.

Executed on 3-19-15.
(Date)


Signature of Movant/Plaintiff

Signature of Attorney
(if any)

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Bethel, NY 2550
One O'Neil Rd.
WRT
H-13640
000111
Henry Bushwick

**THIS PERSON IS AN INMATE
OF WESTERN REGIONAL JAIL**

United States District Court
845 - 5th Ave, Rm 101
Hart, N.Y. 25701

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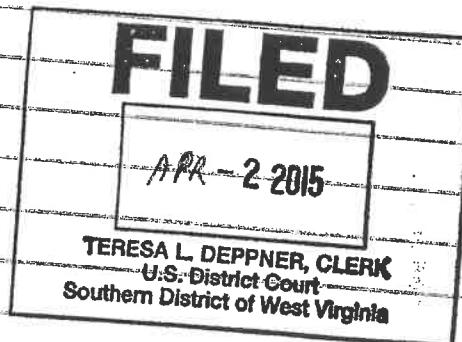
IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA

Kenneth Ray Buskirk
Plaintiff
vs
Huntington Police Dept., ETAL
Defendants
Motion to Amend

CASE NO. 3:15-CV-03503

Now comes the Plaintiff And Respectfully
Request that he be Allowed to Amend his Complaint
Plaintiff has Inducted AN Amended
Complaint with his Request

Respectfully
Submitted



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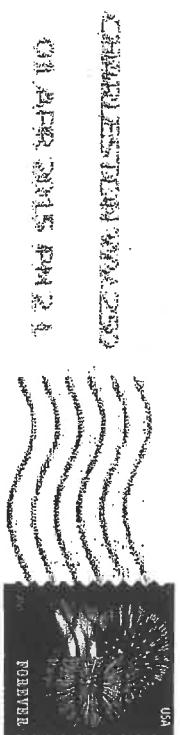
Kenny Buskirk
One o' Hanlon Rd.
Barb. W.V.

THIS PERSON IS AN INMATE
OF WESTERN REGIONAL JAIL

Clerk
United States District Court
845 5th Ave., Rm 101
Minsk, W.V. 25701

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IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA

Kenneth Ray Buskirk,
Plaintiff

vs.

Case No. 3:15-cv-03503

Daniel Wiles;

Christopher Boyer

and Rob Black; Huntington
W.V. Police Officers

Defendants

Amended Complaint

Jury Trial Demanded

1) Plaintiff incorporates all statements and averments
made in the previous complaint as if fully restated
herein

2. All Defendants are being sued in their personal
and professional capacities.

3 All Defendants are state actors acting under
Color of State Law.

Respectfully
Submitted

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA

Kenneth Ray Buskirk,
Plaintiff

vs.

Daniel Wiles;
Christopher Boyer
and Rob Black, Huntington
W.V. Police Officers
Defendants

Case No. 3:15-cv-03503

Amended Complaint
Jury Trial Demanded

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2. All Defendants are being sued in their personal and professional capacities.
3. All Defendants are state actors acting under Color of State Law.

Respectfully
Submitted